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 7 Wells Fargo Home Mortgage, Inc.)
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 10 UNITED STATES DISTRICT COURT
 11 NORTHERN DISTRICT OF CALIFORNIA
 12 SAN JOSE DIVISION

12 AGNES BLACKWELL,
 13 Plaintiff,
 14 vs.
 15 WELLS FARGO HOME MORTGAGE, INC.,
 16 Defendant.

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 18 Case No.: CV10-04917 JF (PVT)
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 20 **WELLS FARGO BANK, N.A.'S REPLY IN
 21 SUPPORT OF ITS MOTION TO DISMISS
 22 COMPLAINT/ALTERNATIVE MOTION FOR A
 23 MORE DEFINITE STATEMENT**
 24
 25 Date: January 28, 2011
 26 Time: 9:00 A.M.
 27 Courtroom: 3, 5th Floor
 28 Judge: The Hon. Jeremy Fogel

Complaint filed: October 29, 2010

20
 21 **I. INTRODUCTION**

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 23 Defendant Wells Fargo Bank, N.A. ("Wells Fargo") (sued as Wells Fargo Home Mortgage,
 24 Inc.) respectfully submits this reply¹ in support of its motion to dismiss plaintiff Agnes Blackwell's
 25 Complaint and also in support of its alternative motion for more definite statement. Blackwell's
 26 opposition offers no meaningful argument in opposition to any point made in Wells Fargo's
 27 motions. The opposition does, however, raise several issues which require elaboration and

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 30 ¹ Wells Fargo attempted to file this reply on its due date, January 14, 2011, but was unable to do so
 31 because of an outage in the Court's Electronic Case Filing system. Accordingly, it is filing on
 32 January 18, 2011, the next business day after January 14.

1 clarification. First, it tries to obfuscate the legal standard by falsely suggesting that the Court
 2 should not apply the well-established review described in *Bell Atlantic Corp. v. Twombly*, 550 U.S.
 3 544 (2007), and *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009). Second, it attempts, unpersuasively, to
 4 convince the Court to apply the doctrine of equitable tolling to its time-barred claims. Third, it
 5 attempts to raise two new claims which are not clearly delineated as such in the complaint. Finally,
 6 it makes frivolous and entirely unwarranted accusations designed to impugn the character of
 7 counsel for Wells Fargo, and requests the Court to impose sanctions—all for the crime of moving
 8 to dismiss.

9 Despite all these distractions, the simple fact remains that Blackwell's complaint is entirely
 10 lacking in merit. It is subject to prompt dismissal by this Court.

11 **II. THE TWOMBLY/IQBAL STANDARD APPLIES TO THIS CASE**

12 Blackwell's opposition presents a threshold question which must be addressed upfront: she
 13 challenges the well-established legal standard by which the Court must review Wells Fargo's
 14 motion to dismiss. *See* Opposition at 23. Specifically, Blackwell claims: "In regards to a Pro Se
 15 Plaintiff, it is maintained by the Plaintiff that *Bell Atlantic Corp. v. Twombly* [550 U.S. 544 (2007)]
 16 and *Ashcroft v. Iqbal* [129 S. Ct. 1937 (2009)] standards do not apply." *Id.*

17 Blackwell is incorrect to claim that *Twombly* and *Iqbal* standards are inapplicable to her
 18 case. It is true that, in its 2010 decision *Hebbe v. Pliler*, the Ninth Circuit noted that pro se prisoner
 19 complaints "must be held to less stringent standards than formal pleadings drafted by lawyers," as
 20 the Supreme Court has reaffirmed since *Twombly*." 627 F.3d 338, 341-42 (9th Cir. 2010) (quoting
 21 *Erickson v. Pardus*, 551 U.S. 89, 94 (2007) (per curiam) (also a pro se prisoner case)). It is not
 22 clear that the holdings of *Erickson* and *Hebbe* extend to non-prisoner pro se cases, such as this one.
 23 But assuming for the sake of argument that they do, even *Hebbe* takes care to note that *Iqbal* is still
 24 the applicable standard. *Id.* at 342 ("we continue to construe pro se filings liberally when
 25 evaluating them under Iqbal" (emphasis added)). Thus, *Hebbe* explains, the post-*Iqbal* standard of
 26 pleading is still "higher" than it was pre-*Iqbal*. *Id.* It is simply the Court's obligation, "where the
 27 petitioner is pro se, particularly in civil rights cases, to construe the pleadings liberally and to
 28 afford the petitioner the benefit of any doubt." *Id.*

1 Here, in this non-prisoner, non-civil rights case, even if the Court were to apply the
 2 *Twombly/Iqbal* standard with an extreme measure of liberality, there would be no avenue by which
 3 Blackwell's complaint could survive the pleading stage. A large portion of the complaint—
 4 including almost the entire facts section—is garbled and impossible to understand. Moreover, no
 5 amount of liberal construction can save causes of action whose statutes of limitation have run, as is
 6 the case with four² of the complaint's six claims. The two remaining claims,³ while not time-
 7 barred, nonetheless also fail for incontrovertible reasons of law which Blackwell makes no attempt
 8 to address in her opposition. The opposition's transparent attempt to confuse the Court by
 9 introducing a fake legal standard should be entirely disregarded.

10 **III. FOUR OF THE SIX CLAIMS ARE TIME-BARRED AND THE COMPLAINT FAILS
 TO ALLEGE ANY COLORABLE BASIS FOR EQUITABLE TOLLING**

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12 The statutes of limitations for negligence, fraud, intentional infliction of emotional distress
 13 (“IIED”), and TILA are set forth in detail in Wells Fargo's motion to dismiss. Briefly, they are:
 14 two years for negligence and IIED, Cal. Code Civ. P. § 335.1; three years for fraud, *id.* § 338(d);
 15 one year for a damages-based TILA claim, 15 U.S.C. § 1640(e); and three years for a rescission-
 16 based TILA claim, *id.* § 1635(f).

17 Blackwell's opposition seems to concede that these claims are time-barred, but she
 18 nonetheless argues that the statutes of limitation should be subject to the doctrine of equitable
 19 tolling (also known as the discovery rule). Specifically, she claims that she “had no notice of
 20 wrong doing until the improprieties of the real estate market were finally made public in the
 21 popular media.” Complaint at 5.

22 It is true that the doctrine of equitable tolling “is designed to prevent unjust and technical
 23 forfeitures of the right to a trial on the merits when the purpose of the statute of limitations—timely
 24 notice to the defendant of the plaintiff's claims—has been satisfied.” *McDonald v. Antelope Valley*

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26 ² The four time-barred claims are negligence, fraud, intentional infliction of emotional distress, and
 27 alleged TILA violations.

28 ³ The remaining two claims are breach of fiduciary duty and breach of the implied covenant of
 29 good faith and fair dealing.

1 *Community College Dist.*, 45 Cal. 4th 88, 99 (2008). “Where applicable, the doctrine will suspend
2 or extend a statute of limitations as necessary to ensure fundamental practicality and fairness.” *Id.*

3 “Whether the discovery rule applies at all is initially a matter of pleading. . . . This pleading
4 requirement is a procedural safeguard against lengthy litigation on the issue of accrual.” *Mangini*
5 *v. Aerojet-General Corp.*, 230 Cal. App. 3d 1125, 1150 (1991). Specifically, “the three elements
6 necessary to establish the doctrine of equitable tolling are (1) timely notice to the defendant, (2)
7 lack of prejudice to the defendant, and (3) reasonable and good faith conduct on the part of the
8 plaintiff.” *Garabedian v. Skochko*, 232 Cal. App. 3d 836, 846 (1991).

9 Blackwell, however, does not allege the first two elements of equitable tolling at all, and
10 she makes only the most conclusory and unpersuasive allegations as to the third. Firstly, Wells
11 Fargo had no timely notice that it could expect this lawsuit so many years after its predecessor in
12 interest (Wachovia) lent money to Blackwell. The complaint alleges nothing to indicate that this
13 first prong of equitable tolling is satisfied.

14 Secondly, the complaint does not aver, and cannot plausibly ever aver, the existence of the
15 next prong—namely that Wells Fargo has not been prejudiced by the long delay. This lawsuit was
16 filed many years after the loans were made, and since that time, it is highly probable that “evidence
17 has been lost, memories have faded, and witnesses have disappeared.” *Order of Railroad*
18 *Telegraphers v. Railway Express Agency*, 321 U.S. 342, 349 (1944) (observing that “[t]he theory
19 [behind statutes of limitation] is that even if one has a just claim it is unjust not to put the adversary
20 on notice to defend within the period of limitation and that the right to be free of stale claims in
21 time comes to prevail over the right to prosecute them”). Blackwell offers no explanation as to
22 how the difficulties enumerated in *Railroad Telegraphers* would not prejudice Wells Fargo, in the
23 event the statutes were tolled.

24 Finally, as to the final element of the discovery rule, it is well-settled that “[a] plaintiff
25 whose complaint shows on its face that his or her claim would be barred by the applicable orthodox
26 statute of limitations, and who intends to rely on the discovery rule to toll the orthodox limitation
27 period, must specifically plead facts which show (1) the time and manner of discovery and (2) the
28 inability to have made earlier discovery despite reasonable diligence.” *CAMSI IV v. Hunter Tech.*

1 *Corp.*, 230 Cal. App. 3d 1525, 1536 (1991). Here, the complaint alleges nothing persuasive or
 2 specific on either prong of *CAMSI*. Blackwell's argument is essentially that she should be allowed
 3 to proceed with her lawsuit because of an unspecified item which she saw on TV or the internet,
 4 which suddenly caused her to "discover" her claims. This is patently inadequate.

5 In light of these considerations, the Court may easily dispose of the four time-barred claims.
 6 Moreover, as no conceivable amendment of the pleadings can bring the events surrounding loan
 7 origination within the applicable statutes of limitations, any dismissal should be with prejudice.

8 **IV. THE OPPOSITION MAKES NO ATTEMPT TO CONTROVERT WELLS FARGO'S
 9 ARGUMENTS AS TO BREACH OF FIDUCIARY DUTY OR BREACH OF THE IMPLIED
 COVENANT**

10 As to the complaint's two remaining claims, Blackwell's opposition does not even try to
 11 controvert the arguments presented in Wells Fargo's motion to dismiss. It is unnecessary to repeat
 12 those arguments here at great length, but briefly, Wells Fargo's position on breach of fiduciary
 13 duty is simply that (in the absence of special circumstances not relevant here) no fiduciary duty
 14 ever exists between borrowers and lenders. *Nymark v. Heart Fed. Savings & Loan Ass'n*, 231 Cal.
 15 App. 3d 1089, 1093 n.1 (1991). Wells Fargo had no duty that it could breach.

16 Likewise, as to breach of the implied covenant of good faith and fair dealing, Blackwell's
 17 complaint fails to identify any express provision in the Deed of Trust or promissory note which has
 18 been frustrated by Wells Fargo's conduct. *See Lingad v. Indymac Fed. Bank*, 682 F. Supp. 2d
 19 1142, 1154 (E.D. Cal. 2010). The implied covenant only exists to the extent that it "rests upon the
 20 existence of some specific contractual obligation." *Sipe v. Countrywide Bank*, 690 F. Supp. 2d
 21 1141, 1160 (E.D. Cal. 2010). Blackwell fails to point to a single "specific contractual obligation"
 22 that Wells Fargo in any way thwarted or frustrated.

23 For these reasons—whose persuasiveness Blackwell has effectively conceded by her failure
 24 to challenge them—the Court should grant Wells Fargo's motion to dismiss on the two remaining
 25 claims stated in the complaint.

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1 **V. THE OPPOSITION APPEARS TO RAISE NEW CLAIMS WHICH THE COMPLAINT**
 2 **DOES NOT CLEARLY DELINEATE AS SUCH**

3 In an attempt to cut through the hodgepodge of the complaint, Wells Fargo’s motion to
 4 dismiss addresses what is essentially its counsel’s best guess as to which claims for relief
 5 Blackwell intends to aver. As noted in Wells Fargo’s alternative motion for a more definite
 6 statement, however, there are innumerable additional references to state and federal law scattered
 7 throughout the complaint. Interestingly, Blackwell’s opposition seems to assume that the
 8 complaint asserts two additional claims for relief which are not specifically addressed by Wells
 9 Fargo’s motion to dismiss: a violation of the Real Estate Settlement Procedures Act, 12 U.S.C. §
 10 2601 *et seq.*, (“RESPA”) and quiet title. Why these two would-be claims (rather than others) have
 11 emerged from the morass of Blackwell’s complaint is unclear; and if indeed they are intended to be
 12 formal causes of action, Wells Fargo requests a more definite statement as to their substance.
 13 Nonetheless, should the Court wish to address these “claims” substantively at this juncture, Wells
 14 Fargo offers the following brief observations.

15 First, any RESPA claims Blackwell might bring are time-barred and cannot get off the
 16 ground. Generally speaking, most alleged violations of RESPA have a statute of limitations of one
 17 or three years from the consummation of the loan, depending on which statute is alleged to be
 18 violated. 12 U.S.C. § 2614 (“Any action pursuant to the provisions of section 2605, 2607, or 2608
 19 of this [RESPA] may be brought . . . within 3 years in the case of a violation of section 2605 of this
 20 title and 1 year in the case of a violation of section 2607 or 2608 of this title from the date of the
 21 occurrence of the violation[.]”). As discussed above and in the motion to dismiss, this lawsuit was
 22 filed significantly more than three years after the date of Blackwell’s mortgage loan.

23 Likewise, Blackwell’s quiet title “claim,” and any other equitable claim she might choose
 24 to aver, would also be non-starters in the absence of an offer to tender her debt in full. Under
 25 California law, a plaintiff lacks standing to challenge a foreclosure sale in equity unless he or she
 26 first tenders the undisputed obligation in full. The failure to tender bars any cause of action
 27 challenging the foreclosure, including causes of action for wrongful foreclosure. Cal. Civ. Code,
 28 §§ 1487, 1493, 1494, 1495; *Abdallah v. United Sav. Bank*, 43 Cal. App. 4th 1101, 1109 (1996)

1 (explaining that the tender rule applies to “any cause of action for irregularity in the sale
 2 procedure”).

3 For these reasons, to the extent that the complaint can be construed as bringing RESPA and
 4 quiet title claims, it should not be allowed to survive the pleading stage.

5 **VI. THE COURT SHOULD IGNORE BLACKWELL’S REQUEST FOR SANCTIONS**

6 One final point remains to be addressed: Blackwell’s opposition casually requests the Court
 7 to impose sanctions on Wells Fargo’s counsel “for filing a frivolous pleading and for failing to
 8 speak with candor to the court as Defendant is totally inept or acted with deliberate intent to
 9 improperly influence the court with false pleadings.” Opposition at 2. These are serious charges
 10 which should not be asserted lightly, as Blackwell seems to do. Moreover, they are, of course,
 11 totally groundless. It is not a sanctionable offense to move to dismiss what is essentially an
 12 incomprehensible and meritless complaint. Wells Fargo has the right to defend itself against this
 13 lawsuit to the full extent permitted by the Federal Rules of Civil Procedure, including making all
 14 appropriate motions under Rule 12.

15 Recognizing the gravity of sanctions requests, Local Rule 7-8 prescribes a strict procedure
 16 to which any party requesting sanctions must adhere. As Blackwell has made no attempt to
 17 comply with Rule 7-8, the Court should simply ignore her opposition’s ridiculous posturing.

18 **VII. CONCLUSION**

19 Blackwell’s complaint must fail in its entirety due to its untimeliness, general
 20 incomprehensibility, and utter failure to allege facts sufficient to support the claims it attempts to
 21 aver. Wells Fargo respectfully requests the Court to grant its motion to dismiss in full; and at an
 22 absolute minimum, the Court should require a more definite statement.

23
 24 DATED: January 14, 2011

SEVERSON & WERSON
 A Professional Corporation

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By: _____ /s/ M. Elizabeth Holt
 M. Elizabeth Holt

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Attorneys for Defendant
 Wells Fargo Bank, N.A.

CERTIFICATE OF SERVICE

I, the undersigned, declare that I am over the age of 18 and am not a party to this action. I am employed in the City of San Francisco, California; my business address is Severson & Werson, One Embarcadero Center, Suite 2600, San Francisco, CA 94111.

On the date below I served a copy, with all exhibits, of the following document(s):

**WELLS FARGO BANK, N.A.'S REPLY IN SUPPORT OF ITS MOTION TO DISMISS
COMPLAINT/ALTERNATIVE MOTION FOR A MORE DEFINITE STATEMENT**

on all interested parties in said case addressed as follows:

Agnes Blackwell
P.O. Box 4418
Santa Clara, CA 95056 Telephone: (408) 396-2425
In Propria Persona

In Propria Persona

(BY MAIL) By placing the envelope for collection and mailing following our ordinary business practices. I am readily familiar with the firm's practice of collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service in San Francisco, California in sealed envelopes with postage fully prepaid.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. I declare that I am employed in the office of a member of the Bar of this Court at whose direction the service was made. This declaration is executed in San Francisco, California, on January 19, 2011.

Sylvia Coleman